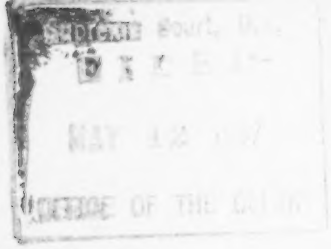

No. 96-1537

In The

Supreme Court of the United States

October Term, 1996

TOM SWINT, TONY SPRADLEY,
DRUCILLA JAMES and JEROME LEWIS,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION
and JAMES C. MORGAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS NOT TO GRANT THE WRIT 2

I. FINDINGS BY THE COURTS BELOW THAT THERE IS NO EVIDENCE THAT SHERIFF MORGAN COMMITTED A CONSTITUTIONAL VIOLATION AND A RECENT HOLDING OF THIS COURT ELIMINATING PETITIONERS' DUE PROCESS CLAIM NECESSARILY MEAN THAT NO LIABILITY EXISTS FOR CHAMBERS COUNTY, EVEN IF MORGAN IS FOUND TO BE ITS POLICYMAKER 2

II. THE ELEVENTH CIRCUIT'S DETERMINATION THAT, UNDER ALABAMA LAW, LOCAL SHERIFFS ARE NOT POLICYMAKERS FOR THE COUNTY GOVERNMENT IS A PROPER APPLICATION OF THIS COURT'S GUIDANCE IN *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986), *CITY OF ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988), AND *JETT V. DALLAS INDEP. SCHOOL DIST.*, 491 U.S. 701 (1989) 6

TABLE OF CONTENTS – Continued

Page

A. *Pembaur, Praprotnik* and *Jett* Emphasize the Importance of State Law in Determining Who Is a Policymaker and for Whom He Makes Policy; They Do Not Dictate Uniformity of Results When Their Principles Are Applied to Different Local Law Contexts 7

B. The Eleventh Circuit in *McMillian* Properly Applied the Principles of *Pembaur, Praprotnik* and *Jett* in the Context of Local Law to Determine That Sheriffs in Alabama Are Not Law Enforcement Policymakers for Local Counties 10

C. Additional Aspects of Alabama Law Support the Conclusion That Sheriffs Are Not Final Policymakers for the County in the Field of Law Enforcement 14

III. IMPOSING LIABILITY UPON CHAMBERS COUNTY, GIVEN THE COUNTY'S LACK OF LAW ENFORCEMENT AUTHORITY UNDER ALABAMA LAW, WOULD UNDERCUT THE BASIC FOUNDATIONS OF MUNICIPAL LIABILITY AS ARTICULATED IN *MONELL* 18

A. Petitioners' Argument Cannot Be Squared With the Primary Factor That Led This Court to Recognize Municipal Liability in *Monell* – the Status of Municipalities as Separate "Corporations" Under State Law..... 19

B. Petitioners' Argument is Also Inconsistent With the Causation Requirement Recognized in *Monell*..... 21

TABLE OF CONTENTS – Continued

Page

1. Origins of the Causation Requirement 21

2. Application of the Requirement to This Case 23

IV. LOGICALLY, IF A SHERIFF IS A *STATE* OFFICER FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY, HE SHOULD NOT BE DEEMED A *COUNTY* POLICY-MAKER 25

V. THE ELEVENTH CIRCUIT'S RELIANCE ON AN EXCEPTION TO THE "LAW OF THE CASE" DOCTRINE DOES NOT PRESENT AN ISSUE APPROPRIATE FOR CERTIORARI 26

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994) 3, 5

Arizona v. California, 460 U.S. 605 (1983).....26, 27

Bishop v. Wood, 426 U.S. 341 (1976)..... 8

Brockett v. Spokane Arcades, Inc. 472 U.S. 491 (1985) 8

Carr v. City of Florence, Ala., 916 F.2d 1521 (11th Cir. 1990) 25

City of Los Angeles v. Heller, 475 U.S. 796 (1986)....3, 5

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) ...*passim*

Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992)..... 25

Etowah County Comm'n v. Hayes, 569 So. 2d 397 (Ala. 1990) 18

Ex parte Purvis, 689 So. 2d 794 (Ala. 1996) 14

Free v. Granger, 887 F.2d 1552 (11th Cir. 1989) 25

Geneva County Comm'n v. Tice, 578 So. 2d 1070 (Ala. 1991) 18

Hereford v. Jefferson Co., 586 So. 2d 209 (Ala. 1991) 14

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) *passim*

King v. Colbert County, 620 So. 2d 623 (Ala. 1993) 18

Lockridge v. Etowah County Comm'n, 460 So. 2d 1361 (Ala. Civ. App. 1984).....12, 17

McMillian v. Johnson, 88 F.3d 1573 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 554 (1996)..... *passim*

Monell v. Department of Social Servs., 436 U.S. 658 (1978) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Parker v. Amerson, 519 So. 2d 442 (Ala. 1987) ... 14, 15, 17

Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989) 15, 25

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)....*passim*

Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) 15

Siegert v. Gilley, 500 U.S. 226 (1991) 19

Swint v. City of Wadley, Ala., 5 F.3d 1435 (11th Cir. 1993)..... 5, 11, 23

Swint v. City of Wadley, Alabama, 11 F.3d 1030 (11th Cir. 1994) 5

Terry v. Cook, 866 F.2d 373 (11th Cir. 1989) 17

United States v. S.A. Empressa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984) 8

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 26, 27

STATUTES

42 U.S.C. § 1983..... *passim*

Ala. Code § 11-1-1..... 15

Ala. Code § 11-3-1..... 15

Ala. Code § 11-3-10 15

Ala. Code § 11-3-11 15

Ala. Code § 11-14-10 .....15, 18

Ala. Code § 12-17-180 16

Ala. Code § 12-17-24 16

Ala. Code § 14-6-1..... 16

TABLE OF AUTHORITIES – Continued

Page

Ala. Code § 14-6-84 16

Ala. Code § 14-6-85 16

Ala. Code § 14-6-86 16

Ala. Code § 14-6-90 16

Ala. Code § 14-6-98 16

Ala. Code § 36-22-16 18

Ala. Code § 36-22-18 18

Ala. Code § 36-22-2(3) 16

Ala. Code § 36-22-3 1

Ala. Code § 36-22-3(1) 16

Ala. Code § 36-22-3(4) 11, 16

Ala. Code § 36-22-5 16

Local Act No. 96-630 (1996) 18

Local Act No. 87-841 (1987) 18

CONSTITUTIONAL PROVISIONS

U. S. Const. amend XI 1

Ala. Const. art. I, § 14 14

Ala. Const. art. V, § 112 ..... 1, 14, 15

Ala. Const. art. V, § 121 ..... 16, 17

Ala. Const. art. V, § 138 ..... 1, 15, 17

Ala. Const. art. VII, § 174 ..... 1, 17

TABLE OF AUTHORITIES – Continued

Page

Ala. Const. art. VII, § 175 17

Ala. Const. art. VII, § 3 (1875) 17

OTHER AUTHORITY

Fed. R. Civ. P. 50(a) 28

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Chambers County Commission and James C. Morgan respectfully request that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions directly at issue in the questions raised by the Petition for a Writ of Certiorari are the Fourth Amendment, the Eleventh Amendment and the Fourteenth Amendment. The only statutory provision involved is 42 U.S.C. § 1983.

State constitutional provisions which are involved in the issues before the Court include: Ala. Const. of 1901, art. V, § 112; art. V, § 138; art. VII, § 174 and amend. No. 35. State statutory provisions involved include: Ala. Code § 36-22-3; Local Acts of Alabama Nos. 1180, 96-630, 87-481. The texts of the local acts are reproduced in the Appendix.

STATEMENT OF THE CASE

Upon review of the Petitioners' "Statement of the Case", Respondents do not perceive any misstatements of the facts which would have a bearing on the "question of

what issues would properly be before the Court if certiorari were granted" except the following: the Petitioners state that the first appeal arose out of "various motions to dismiss." Pet. 2. That is incorrect. The appeal arose out of the denial of summary judgment. Also, the Petitioners allude to an alleged "concession that the Court already held that there was sufficient evidence against [Morgan] to require a trial." Pet. 4. Respondents deny making such a concession. Perhaps the Petitioners are referring to an argument made in the alternative, i.e., that, assuming for the sake of argument that sufficient evidence existed, Sheriff Morgan would still be entitled to qualified immunity. Respondents deny that this is a "concession" in the sense intended by the Petitioners.

REASONS NOT TO GRANT THE WRIT

I. FINDINGS BY THE COURTS BELOW THAT THERE IS NO EVIDENCE THAT SHERIFF MORGAN COMMITTED A CONSTITUTIONAL VIOLATION AND A RECENT HOLDING OF THIS COURT ELIMINATING PETITIONERS' DUE PROCESS CLAIM NECESSARILY MEAN THAT NO LIABILITY EXISTS FOR CHAMBERS COUNTY, EVEN IF MORGAN IS FOUND TO BE ITS POLICYMAKER.

On page 5 of the petition, Swint[1] contends that his petition should be granted because the same issue is presented in *McMillian v. Monroe County*, No. 96-452,

[1] For the sake of brevity, Respondents will refer to the Petitioners collectively as "Swint".

where this Court granted certiorari and decision is pending. That reasoning, however, is suspect considering an important distinction between the two cases. In *McMillian*, Sheriff Tate has been denied qualified immunity on several grounds and most likely will face a trial on the question of whether he violated Walter McMillian's constitutional rights. In the instant case, the lower courts have found that there is no evidence to support a claim that Sheriff Morgan violated the Petitioners' constitutional rights on two of Petitioners' three claims. This Court's holding in *Albright v. Oliver*, 510 U.S. 266 (1994) removes any basis for Petitioners' third and final claim. Consequently, even assuming for the sake of argument that this Court in *McMillian* finds that Alabama sheriffs are county policymakers, there would still be no basis for liability against Chambers County in this case where the "policymaker" has inflicted no constitutional injury. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (stating that "[none] of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm").

The Petitioners' prior claims against the Respondents arose out of the Fourth Amendment, the Equal Protection Clause, and the Due Process Clause. The first two of these claims against Sheriff Morgan have been stricken under circumstances which indicate there was insufficient evidence for a jury to find a constitutional violation. With respect to the Fourth Amendment, the district court below, in its January 29, 1996 opinion, found the following:

> Sheriff Morgan's Supplemental Affidavit presented evidence that his policies were fully in line with the constitutional standards. The Plaintiffs have not presented any testimony, or other evidence, to contradict Sheriff Morgan's sworn statement as to his policy. Accordingly, Sheriff Morgan has presented sufficient, additional evidence to change the opinion of this Court as to its original grounds for denying summary judgment. This Court finds that there is no evidence that it was Sheriff Morgan's policy to search or detain non-suspects, nor that it was his policy to search an entire business premises unless probable cause and exigent circumstances justified such a search. Furthermore, no evidence has been presented which would indicate that Sheriff Morgan has any reason to doubt that his policies and training were adequate, at least going into the first raid. . . . Without refuting Sheriff Morgan's testimony about his policies or his knowledge of the alleged events at the first raid, Plaintiffs have failed to point to any facts which could show that Sheriff Morgan's policies, or his failure to adopt new policies after the first raid, amounted to deliberate indifference to the Plaintiffs' constitutional rights.

Pet. App. 23, 26. The Eleventh Circuit affirmed this finding of fact. Pet. App. 5 ("the plaintiffs have neither controverted that affidavit evidence nor have they pointed to inconsistencies in any of Morgan's statements, or to any other evidence, that would create a genuine issue of material fact about it"); *Id.* at 6-7 ("Because the record, which includes the affidavit, contains uncontroverted evidence that Sheriff Morgan had no knowledge of the alleged constitutional violations prior to authorizing a

second raid, the district court properly granted Morgan's motion for summary judgment . . . ").

Although the district court judge denied Morgan summary judgment on the equal protection clause and that ruling was originally affirmed, *see Swint v. City of Wadley, Alabama*, 5 F.3d 1435, 1447 (11th Cir. 1986); upon rehearing, the Eleventh Circuit "reverse[d] the denial of summary judgment to Sheriff Morgan on the equal protection claims." *Swint v. City of Wadley, Alabama*, 11 F.3d 1030, 1031 (11th Cir. 1994). This reversal was based on the fact that the court found "no evidence that Sheriff Morgan's actions in authorizing the raids on the Club were motivated by intentional racial discrimination[;] there is no genuine issue of material fact in so far as the equal protection claims relate to him." *Id.*

Finally, Sheriff Morgan was awarded qualified immunity on the substantive due process claim after the Eleventh Circuit found no violation of clearly established law. Because Sheriff Morgan was granted qualified immunity based on a lack of clearly established law, it is conceivable that Petitioners' substantive due process claim might remain viable against Chambers County. However, subsequent authority from this Court forecloses Petitioners' substantive due process claims. *See Albright v. Oliver*, 510 U.S. 266, 273-274 (1994) (holding that the substantive due process clause could not be invoked where protection against government intrusion is provided by other constitutional provisions).

Based on the reasoning in *Heller, supra*, because no claim remains viable against Morgan and therefore no jury could find that Sheriff Morgan violated Petitioners'

constitutional rights, Chambers County would be free from liability as well, even assuming Sheriff Morgan is its policymaker. Thus there is no basis for the granting of certiorari on the county liability issue.

II. THE ELEVENTH CIRCUIT'S DETERMINATION THAT, UNDER ALABAMA LAW, LOCAL SHERIFFS ARE NOT POLICYMAKERS FOR THE COUNTY GOVERNMENT IS A PROPER APPLICATION OF THIS COURT'S GUIDANCE IN *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986), *CITY OF ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988), AND *JETT V. DALLAS INDEP. SCHOOL DIST.*, 491 U.S. 701 (1989).

Petitioners challenge the Eleventh Circuit's determination that Alabama sheriffs are not final *county* policymakers in the area of law enforcement primarily because the decision is, in their view, inconsistent with this Court's holding in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (plurality opinion). Indeed, *Pembaur* did accept the Sixth Circuit's conclusion that, under Ohio law, sheriffs and prosecutors are county officials authorized to establish official law enforcement policy for the county. 475 U.S. 476. However, *Pembaur* cannot fairly be characterized as establishing a universal principle that, under the laws of all states, sheriffs will be considered final policymakers for counties with respect to law enforcement activities. To the contrary, *Pembaur* and its progeny recognize that since no two states are going to define policymaking authority identically, the various circuit courts of appeal should make independent evaluations of each state's law and these evaluations are due to be

afforded "great deference." *See Pembaur*, 475 U.S. at 484 & n. 13; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25 (1988) (plurality opinion); and *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737-38 (1989).

Praprotnik and *Jett* make it clear that the question presented by petitioner must be resolved on the basis of *state* law. *See Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123 (plurality opinion). Because the Eleventh Circuit properly based its decision on an analysis of Alabama law, the holding below is consistent with the legal principles articulated in *Pembaur*.

A. *Pembaur, Praprotnik* and *Jett* Emphasize the Importance of State Law in Determining Who Is a Policymaker and for Whom He Makes Policy; They Do Not Dictate Uniformity of Results When Their Principles Are Applied to Different Local Law Contexts.

In *Pembaur*, this Court wisely refused to delve into the minutiae of Ohio state law and re-examine the Sixth Circuit's basis for holding Ohio counties liable for the misconduct of sheriffs and prosecutors. Instead, the Court merely accepted the Sixth Circuit's determination as being the "definitiv[e] constru[ction] . . . " of Ohio law and proceeded to analyze the county's liability under § 1983 taking the Sixth Circuit's determination as a given. 475 U.S. at 491 (O'Connor, J., concurring). Justice Brennan, in writing for the plurality, consistently referred to the description of Ohio sheriffs as final county policymakers as being the Sixth Circuit's conclusion, not the conclusion of this Court.

> Based upon *its* examination of Ohio law, the *Court of Appeals* found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement.

475 U.S. at 476 (citation omitted) (emphasis added); *see also* 475 U.S. at 484 ("[T]he *Court of Appeals* concluded, based upon *its* examination of Ohio law . . . ") (emphasis added). Because the Sixth Circuit's determination on the issue of final policymaking authority necessarily arises out of state law, 475 U.S. 483, this Court, as is its practice in matters involving state law, afforded the determination "great deference." 475 U.S. at 484 n. 13 (*citing United States v. S.A. Empressa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 815 n. 12 (1984); *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 499-500, 105 S. Ct. 2794, 2799-2800, 86 L. Ed. 2d 394 (1985) (citing cases); and *Bishop v. Wood*, 426 U.S. 341, 345-347, 96 S. Ct. 2074, 2077-2078, 48 L. Ed. 2d 684 (1976)).

Since *Pembaur* was released, this Court has revisited the question of final policymaking liability in two cases, one of which is not cited in Swint's Petition for Certiorari. Although neither of the cases involve county sheriffs, both look to state law on the issue and, just as significantly, defer to the court of appeal's construction of state law.

In *City of St. Louis v. Praprotnik, supra*, the Plaintiff, once a management-level city employee, contended that the City demoted him and later terminated his employment without due process of law and in retaliation for the exercise of protected free speech. 485 U.S. at 114-17.

Instead of looking to local law to see where final policymaking authority for employment was vested, as *Pembaur* suggested, the court of appeals ignored the most relevant portions of local law and broadly defined the term "municipal policymaker." 485 U.S. at 131. This Court, in reversing the Eighth Circuit, warned that "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." 485 U.S. at 126. Furthermore, the Court recognized that since states have "wide latitude" in structuring the powers given to local governments, the question of who retains final policymaking authority will be answered in a variety of ways. 485 U.S. at 124-25.

Most recently, in *Jett v. Dallas Indep. School Dist., supra,* this Court addressed the issue of final policymaking authority in yet another context. In *Jett,* a high school football coach alleged that both the school principal and the district superintendent had him demoted and transferred in retaliation for the exercise of protected free speech and because of racial animus. Jett sued the school district contending that the district had delegated to the principal and superintendent final policymaking authority in the matter of employment. From a substantial plaintiff's verdict, the school district appealed on the ground that the plaintiff had failed to prove that the individual defendants' conduct represented official school district policy. The Fifth Circuit Court of Appeals agreed with the school district and reversed on this ground. Although generally affirming the Fifth Circuit's reversal of the district court, this Court remanded the issue of final policymaking authority to the Court of

Appeals with instructions for the court to examine Texas law on the issue. 491 U.S. at 737-38. Again, great deference is shown, in this case prospectively, to the court of appeals' determination as to state law. "We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the defendant] possessed final policymaking authority. . . . " *Id.*

B. The Eleventh Circuit in *McMillian* Properly Applied the Principles of *Pembaur, Praprotnik* and *Jett* in the Context of Local Law to Determine That Sheriffs in Alabama Are Not Law Enforcement Policymakers for Local Counties.

In *McMillian v. Johnson*, 88 F.3d 1573, 1577-78 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 554 (1996)[2], the Eleventh Circuit Court of Appeals sets out general principles of municipal liability which can be gleaned from *Monell, Jett, Praprotnik,* and *Pembaur*. Significantly, Swint's petition fails to point out exactly where the Eleventh Circuit departed from the principals stated in *Pembaur, Praprotnik,* and *Jett*. Instead, Swint is content to point out the result of the Sixth Circuit's analysis in *Pembaur,* note the similarities between Ohio sheriffs and Alabama sheriffs, ignore the stark differences, and demand the same result from the Eleventh Circuit when applying Alabama law. This approach is overly simplistic.

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[2] Respondents refer to *McMillian* because it is in that opinion that the Eleventh Circuit fully sets out its reasoning with respect to county liability for the acts of sheriffs. *See* Pet. App. 4.

After analyzing this Court's most recent pronouncements on the issue of municipal policymaking liability, the Eleventh Circuit took what it called a "fresh look" at its prior holding in *Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993), which had been vacated by this Court on jurisdictional grounds. *McMillian*, 88 F.3d at 1578. In *Swint*, the Eleventh Circuit, facing the identical question presented by the instant case, determined that Alabama sheriffs are not final policymakers for the county with respect to law enforcement. The court's reasoning was founded upon the inescapable conclusion that Alabama counties possess no law enforcement authority. *See id.* In reaffirming the reasoning of the original *Swint*, the court pointed out how closely associated Alabama sheriffs are with state as opposed to county government. First, Alabama sheriffs are state officers and not county officials and, therefore, counties are not liable for the actions of sheriffs, according to state law, under a *respondeat superior* theory. *Id.* In fact, the "critical question" decided in *Swint*, and re-examined in *McMillian*, was "whether an Alabama sheriff exercises *county power* with final authority when taking the challenged action." *Id.* (emphasis added). The Eleventh Circuit answered that question in the negative in both *Swint* and *McMillian* because Alabama grants law enforcement authority to sheriffs and not counties. *Id.*; *see* Ala. Code § 36-22-3(4) (1991) ("It shall be the duty of the *sheriffs* in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to gather evidence of crimes in their counties. . . . ") (emphasis added). This statutory grant of power directly to sheriffs is significant because, under

Alabama's governmental structure, county governments can only exercise the authority explicitly granted them by the state legislature. *Id.* (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)).

The court then explains why it is convinced that a municipality must possess power in a particular area before it can incur liability for an official's actions in that area. Pet. App. 8a. Such a conclusion is rooted in the description of a municipal policymaker as the official with final decisionmaking responsibility "in any given area of a local government's business." *Id.* (quoting *Praprotnik*, 485 U.S. at 125). Based on that language, the court properly concluded that, in a case like the instant one, the threshold question is "whether the official [was] going about the local government's business" when the alleged violation occurred? *Id.* The opinion then listed a variety of other circuits which had asked similar questions in similar contexts. *Id.* at 1578-79.

The court also addresses the illogic of the position that because the sheriff's law enforcement authority is unreviewable within the county and he possesses no significant law enforcement authority outside the county, the authority he holds must derive *from* the county. If, as *Praprotnik* concludes, different entities can share final policymaking authority, it naturally follows that one policymaker's actions could support municipal liability even though other policymakers possessed final policymaking authority and set different policy. *Id.* at 1579. The court analogized to a scenario where a particular city council could authorize its police department precinct commanders to set their own arrest policies without creating a patchwork quilt of precinct liability; liability would still

attach only to the municipality which had delegated its final policymaking authority to each precinct commander. *Id.*

In the next major section of the *McMillian* opinion, the court of appeals below addressed Swint's contention that either this Court's or the Sixth Circuit's ruling in *Pembaur* "controls" the result in the instant case. *Id.* at 1579-80. The Eleventh Circuit properly observed that this Court's *Pembaur* opinion did not address the question of whether an Ohio sheriff is a county policymaker nor did the decision comment upon the state law factors underlying the Sixth Circuit's conclusion that Ohio sheriffs are county policymakers. *Id.* In *Pembaur*, the sole "question presented [was] whether and in what circumstances, a decision by municipal policymakers *on a single occasion* may satisfy" the *Monell* official-policy requirement. 475 U.S. at 471 (emphasis added).[3] Even if this Court's decision in *Pembaur* can be read to give implicit approval to the Sixth Circuit's reading of Ohio law, that decision would not dictate the same conclusion in this case. As the Eleventh Circuit observed, "Ohio law determined the Sixth Circuit's conclusion[; b]ut Alabama law compels our conclusion." *Id.*

The Eleventh Circuit's opinion goes on to refute Swint's claim that Alabama law and Ohio law are

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[3] *See also* Brief of Petitioner in No. 84-1160, *Pembaur v. City of Cincinnati* (presenting, as the sole question for review, the following: "Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy as to render a county liable under 42 U.S.C. § 1983?").

virtually the same in the manner that each allocates law enforcement authority. *Id.* at 1580-81. While similarities exist, especially in election (by county electors) and fiscal support (county pays salary and funds sheriff's department), significant differences exist. First, under an explicit provision of the Alabama Constitution of 1901, sheriffs are state officers and part of the state executive department. *See* Ala. Const. art V, § 112; *Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987). As stated above, because of their unique relationship with the state, Alabama sheriffs cannot create respondeat superior liability for the counties in which they operate. *See Hereford v. Jefferson Co.*, 586 So. 2d 209, 210 (Ala. 1991); *Parker v. Amerson*, 519 So. 2d at 442. Significantly, the association of Alabama sheriffs with the state is so close that sheriffs are protected by Alabama's grant of sovereign immunity in Article I, § 14 of Alabama's Constitution. *McMillian*, 88 F.3d at 1580 (citing *Hereford*, 586 So. 2d at 210; *Parker v. Amerson*, 519 So. 2d at 442); *see also Ex parte Purvis*, 689 So. 2d 794, 795-96 (Ala. 1996) (noting sheriffs' constitutional status as a state officer and granting sovereign immunity). Clearly, Alabama's constitutional and statutory establishment of its sheriffs as state executive officers is much more substantial than an occasional label. There is nothing comparable in Ohio law which so closely identifies sheriffs with the state. *McMillian*, 88 F.3d at 1580.

C. Additional Aspects of Alabama Law Support the Conclusion That Sheriffs Are Not Final Policymakers for the County in the Field of Law Enforcement.

Besides the aspects of Alabama law mentioned in its opinion, other state law considerations undergird the Eleventh Circuit's determination.

Alabama, like all other states, has both a state government and county governments. Ala. Code § 11-1-1 (1975). Unlike in many states, however, Alabama counties do not have "home rule" powers and are restricted to performing relatively narrow functions expressly delegated to them by state law. These functions primarily involve construction and maintenance of the county road system, a county courthouse, and a county jail.[4] Ala. Code §§ 11-3-10, 11-3-11, 11-14-10 (1975). There is no statute authorizing counties to engage in law enforcement.

The nature of functions of the office of sheriff in Alabama are also specified by state law. There is a sheriff in each county of the State, elected by the voters of that county. Ala. Const. art. V, § 138. As mentioned above, under the Alabama Constitution of 1901, sheriffs are specifically designated as *state* executive officials. *Id.* at § 112 ("The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, *and a sheriff for each county.*") (emphasis added). As a result, they share the same sovereign immunity and Eleventh Amendment immunity accorded to other state officials. *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987).

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[4] This Court recognized just five years ago that the "principal function" of county commissions in Alabama "is to supervise and control the maintenance, repair, and construction of county roads." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 493-94 (1992) (citing Ala. Code §§ 11-3-1, 11-3-10).

Sheriffs in Alabama have three basic functions: assisting the state judicial system by serving process and performing other related tasks, Ala. Code § 36-22-3(1); operating the jail, *Id.* at § 14-6-1; and enforcing state law in their county, *Id.* at § 36-22-3(4). With respect to judicial functions, the sheriffs take orders from, and are supervised by, state judges when they are sitting in their counties.[5] With respect to jail operations, they receive general supervision from the Alabama Department of Corrections. *See id.* at §§ 14-6-84, 14-6-85, 14-6-86, 14-6-90, and 14-6-98. In the area of law enforcement, sheriffs are not supervised on a day-to-day basis, but they can be directed to perform criminal investigations and make reports about those investigations to the governor, the state attorney general, or the district attorney. *Id.* at § 36-22-5.[6] Moreover, the governor is authorized to require sheriffs to provide "information in writing, under oath," concerning the conduct of their duties. Ala. Const. art. V, § 121.

The 1901 Constitution also specifies that sheriffs may be removed from office for misconduct only through an original impeachment action in the Alabama Supreme

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[5] The primary trial court in the Alabama judicial system is the circuit court. There are forty judicial circuits, some of which are limited to one county while others encompass multiple counties. The presiding judge of each circuit exercises "general supervision" over the sheriff or sheriffs in the circuit. Ala. Code § 12-17-24. Other judges may also direct the activities of sheriffs with respect to particular matters. *Id.* at § 36-22-2(3).

[6] District attorneys, in turn, are state employees elected to perform prosecutorial functions for a given judicial circuit. Ala. Code § 12-17-180.

Court, generally initiated by the state attorney general at the request of the governor. Ala. Const. art. VII, § 174. This was a change from the former system, under which sheriffs were impeached at the local level. Ala. Const. art. VII, § 3 (1875).[7] The change was made in order to tighten central control over sheriffs, in response to the perception that "the neglect of sheriffs" had led to an "excessive number of lynching cases in Alabama." *Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987). At that time, "the failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism . . . led [the Governor] to believe that sheriffs must be held accountable to a higher and more central authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners." *Id.* at 443-44; *see also id.* at 444. ("Sheriffs were made more accountable to the supreme executive power of the state, the Governor.").[8]

Alabama law gives county commissions *no* role in the development of policies governing local law enforcement or in the supervision of sheriffs in the performance of their law enforcement duties. *See Lockridge v. Etowah County Comm'n*, 460 So. 2d at 1363; *see also Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989) (noting that county

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[7] A very similar provision, covering removal by county courts of various specified "county officers" and city officials, but *excluding* sheriffs, was retained in the 1901 Constitution. Ala. Const. art. VII, § 175.

[8] The 1901 Constitution also specified that it was an impeachable offense for a sheriff to make a false report to the Governor or to allow a prisoner in the county jail to be removed and killed or injured. Ala. Const. art. V, §§ 121, 138.

commissions have no authority to hire or fire deputy sheriffs); *King v. Colbert County*, 620 So. 2d 623, 625 (Ala. 1993) (holding that county commissions have no control over jail operations). They do, however, have statutory obligations to provide funds and facilities to be used by sheriffs. *See* Ala. Code § 11-14-10 (duty to maintain a jail); *id.* at § 36-22-16 (duty to pay a specified salary to sheriff); *id.* at § 36-22-18 (duty to furnish sheriff with necessary quarters, supplies, and automobiles). If a county appropriates an unreasonably small amount of money for these purposes, a sheriff can sue the commission in state court for relief. *See Geneva County Comm'n v. Tice*, 578 So. 2d 1070 (Ala. 1991); *Etowah County Comm'n v. Hayes*, 569 So. 2d 397 (Ala. 1990). Most, if not all, sheriffs also have access to funds outside of the county commission's control, like pistol permit funds. *See* Local Acts of Alabama, No. 96-630 (1996) (pertaining to Chambers County Sheriff), App. 1a; No. 87-481 (1987) (pertaining to Monroe County Sheriff), App. 1a-2a.

III. IMPOSING LIABILITY UPON CHAMBERS COUNTY, GIVEN THE COUNTY'S LACK OF LAW ENFORCEMENT AUTHORITY UNDER ALABAMA LAW, WOULD UNDERCUT THE BASIC FOUNDATIONS OF MUNICIPAL LIABILITY AS ARTICULATED IN *MONELL*.

Although the Eleventh Circuit in *McMillian*, 88 F.3d at 1577, noted arguments based on *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), nothing in the opinion indicates it based its holding on these arguments. Nonetheless, the Court should deny certiorari on the alternative basis that a holding in favor of Chambers County is

compelled by the reasoning of *Monell*. *Cf. Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (affirming the circuit court of appeals on a ground not relied upon by the circuit court). For the reasons stated below, the holding of this Court in *Monell* is extremely important to the question presented to the Court.

A. Petitioners' Argument Cannot Be Squared With the Primary Factor That Led This Court to Recognize Municipal Liability in *Monell* – the Status of Municipalities as Separate "Corporations" Under State Law.

In *Monell*, this Court held that municipalities were "persons" within the meaning of § 1983. The Court based its conclusion on the fact that municipalities are organized as "corporations" under state law and because the Dictionary Act and various Court decisions had determined that by 1871 corporations (including "municipal corporations") were generally treated as "persons" for purposes of statutory analysis. 436 U.S. at 687-89. This view of municipalities as separate public corporations is a consistent theme throughout the *Monell* opinion and throughout the legislative record analyzed in that opinion. *See, e.g.*, 436 U.S. at 668-69. It was this that led the Court to equate municipalities with the other "persons" who could be sued under § 1983 – i.e., individual public officials in their individual capacities. *See, e.g.*, 436 U.S. at 685-86; *see also* 436 U.S. at 682; *id.* at 707-08 (Powell, J., concurring).

However, accepting the petitioner's position – that Chambers County is liable for policies created by the

incumbent in an office that it did not create and cannot control – would require the Court to abandon this concept of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is difficult to imagine how a single corporation could include both a governing board and a separate official vested with unchecked authority to set corporate policy. That reality is reflected in the suits against "municipalities," 436 U.S. at 690, suits against "[l]ocal governing bodies," *id.*, and suits against a local "government as an entity." *Id.* at 694. Certainly, the Sheriff of Chambers County is not a municipality, a local governing body or a local government, nor is he an agent thereof.

In essence, petitioners seek to have the Court adopt a radically different conception of "Chambers County" as a unit of *geography*, which can have "policies" that are set both by the County Commission (including those officials to whom the commission delegates authority) *and* by any other officials authorized by state law to operate in that geographic area. But it was not suits against units of geography but suits against "municipalities," defined as units of *government*, that the Supreme Court had in mind in *Monell*. *See* 436 U.S. at 694 ("[I]t is when the execution of a government's policy or custom . . . inflicts the injury that the *government* as an entity is responsible under § 1983.") (emphasis added). The only basis for treating municipalities as "persons" under § 1983 was the Supreme Court's understanding in *Monell* of cities and counties as corporate entities with a separate, coherent and cohesive structure and a single governing body. It

would make no sense to abandon that understanding and thereby expand municipal liability beyond anything that Congress could have had in mind.

B. Petitioners' Argument is Also Inconsistent With the Causation Requirement Recognized in *Monell*.

The tension between petitioners' position and *Monell* is even clearer in light of the Supreme Court's second holding – that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy* of some nature *caused* a constitutional tort." 436 U.S. at 691 (emphasis added); *see also id.* at 694 (allowing municipal liability since the case "unquestionably involve[d] official policy as the *moving force* of the constitutional violation") (emphasis added). In every legal and practical sense, it is absurd to suggest that Chambers County as a municipal corporation (or the Chambers County Commission as its governing body) adopted or ratified a law enforcement policy that caused the alleged violations of petitioner's constitutional rights.

1. Origins of the Causation Requirement.

The causation requirement in *Monell* was derived, in part, from the language of § 1983, which creates a right of action against "any person who . . . shall subject or cause to be subjected" any other person to a deprivation of federal rights. As the Supreme Court recognized, this "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee

to violate another's constitutional rights," but it also "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U.S. at 692; *see also Pembaur*, 475 U.S. at 478 (stating that "*Monell* is a case about responsibility.").

Even more important to the Court's conclusion was "the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Pembaur*, 475 U.S. at 479 (emphasis in original). This insight was derived from rejection in the House of Representatives of the "Sherman amendment," a proposed addition to the same act that contained § 1983, which, as noted above, would have imposed liability on municipalities whenever private citizens within their borders " 'riotously and tumultuously assembled . . . with intent to deprive' " another person of a federal right. *See Monell*, 436 U.S. at 666 (quoting the first conference version of the amendment); *see also Jett*, 491 U.S. at 726-27.

As the *Monell* Court exhaustively demonstrated, this proposal was defeated on the ground that many of "the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local government to create police forces," either directly or through imposition of liability for damages. 436 U.S. at 673; *see also id.* at 680 (quoting Rep. Burchard); Cong. Globe 794 (April 19, 1871) (Rep. Poland); *id.* at 791 (Rep. Willard); *id.* at 795 (Rep. Blair). The *Monell* Court noted that the legislative history

reveals "ample support for [Representative] Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. But, having reviewed this history, the Supreme Court in *Monell* concluded that Congress in 1871 did not create the same "Hobson's choice," because, instead of "imposing an obligation to keep the peace" that did not exist in state law, § 1983 applied only where "a municipality . . . was obligated by state law to keep the peace, but . . . had not in violation of the Fourteenth Amendment." *Id.*

2. Application of the Requirement to This Case.

The *Monell* causation requirement is implicated here in two ways. First, of course, there is a conflict between petitioner's position and the *Monell* Court's specific holding that § 1983 cannot be read to impose liability on municipalities for failure to enforce the law if state law does not grant them law enforcement powers. As the Eleventh Circuit in *McMillian* held, "Alabama law assigns law enforcement authority to sheriffs but not to counties." *McMillian v. Johnson*, Pet. App. at 8a (citing with approval *Swint v. City of Wadley, Ala.*, 5 F.3d 1436, 1450 (11th Cir. 1993)). The Chambers County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff. Yet petitioner contends that the County should face potential liability

under § 1983 based entirely on the law enforcement actions of Sheriff Morgan.

Indeed, under petitioner's theory, the County's only means of avoiding potential liability would be to violate state law and exceed its assigned authority by attempting to control the sheriff. This is precisely the outcome that Congress sought to avoid when it rejected the Sherman amendment on the ground that it would force municipalities to perform law enforcement functions not delegated to them by state law. Thus, here again, petitioner asks the Court to adopt a statutory interpretation that would undercut one of the central understandings expressed in *Monell* itself.

At a more general level, the Court held in *Monell* that a municipality may not be held liable "*solely* because it employs a tortfeasor – or, in other words, . . . on a *respondeat superior* theory." *Monell* 436, U.S. at 691 (emphasis in original). It concluded that Congress, having rejected one limited form of vicarious liability based on constitutional concerns in the Sherman amendment, could hardly have intended to authorize a broader form that "would have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693; *see also Jett*, 491 U.S. at 728-29. Petitioner's theory, however, would have the perverse effect of allowing a form of vicarious liability under § 1983 that is even more extreme than the *respondeat superior* theory rejected in *Monell*.

IV. LOGICALLY, IF A SHERIFF IS A *STATE* OFFICER FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY, HE SHOULD NOT BE DEEMED A *COUNTY* POLICYMAKER.

Another alternative ground for denying the Petition is on the basis of the Eleventh Amendment. Before a governmental body can be held liable for the actions of a particular individual policymaker, obviously, the policymaker must be vested, by virtue of his office, with the authority to make policy. A policymaker, when setting policy for a governmental entity, necessarily acts in his "official capacity."

The Eleventh Circuit, in interpreting the Eleventh Amendment, has consistently found Alabama sheriffs (executive officers of the state) and their deputies, in their official capacities, to be representatives of the state and not the county. Consequently, suits against them in their official capacity are routinely dismissed based upon lack of jurisdiction. *See Dean v. Barber*, 951 F.2d 1210, 1215 n. 5 (11th Cir. 1992); *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989); *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *see also Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1527 (11th Cir. 1990) (holding that Eleventh Amendment immunity also extends to deputy sheriffs in Alabama). In the instant case, the district judge dismissed Sheriff Morgan in his official capacity based on his entitlement to Eleventh Amendment Immunity as an officer of the state of Alabama.

Swint does not challenge the ruling that Alabama sheriffs are state officers for the purpose of the Eleventh Amendment but contends that sheriffs are policymakers

for the county nonetheless. These theories are mutually exclusive. A single official cannot simultaneously be both a county policymaker and the equivalent of the state when sued in his official capacity. A sheriff in Alabama, therefore, is necessarily a policymaker for the state and not the county.

V. THE ELEVENTH CIRCUIT'S RELIANCE ON AN EXCEPTION TO THE "LAW OF THE CASE" DOCTRINE DOES NOT PRESENT AN ISSUE APPROPRIATE FOR CERTIORARI.

On pages 8 and 11 of the petition, Swint contends that this Court should also grant a writ of certiorari to review the Eleventh Circuit's ruling with respect to the "law of the case" issue. However, the holding of the Eleventh Circuit on this question does not present an issue appropriate for this Court's review because the Eleventh Circuit's holding does not conflict with any holding of this Court, there is no conflict among the circuits, and no important federal question is raised.

This Court has rarely discussed the "law of the case" doctrine. Where the doctrine is discussed, the Court has described it as "an amorphous concept" which does not limit the power of the court; it serves only to direct the court's discretion. *Arizona v. California*, 460 U.S. 605, 618 (1983) (refusing to apply the "law of the case" doctrine in the context of original jurisdiction). This Court has also recognized exceptions to the doctrine's application where there are "changed circumstances or unforeseen issues not previously litigated." *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992). In *Arizona*, the court emphasized that it

retained the power to reopen a ruling if it thought a prior judgment had been in error. *Id.*

Nothing in the Eleventh Circuit's "law of the case" jurisprudence or application of the doctrine in the instant case is in conflict with this Court's general view of the doctrine. The Eleventh Circuit recognizes the "law of the case" rule but allows an exception to the rule "where new and substantially different evidence material to the issue has been presented after the appellate decision." Pet. App. 5. Nothing about this exception is contrary to this Court's interpretation of the doctrine. *See Wyoming*, 502 U.S. at 446 (recognizing "changed circumstances or unforeseen issues" as an exception to the doctrine but noting that Oklahoma had only "recited the same facts").

After setting out the doctrine and its exceptions, the Eleventh Circuit went on to find, as the district court had found after reviewing the record, that Respondent Morgan had presented substantially different evidence on the second motion for summary judgment than had been presented on the first motion for summary judgment. Pet. App. 6. The question of whether the district court properly viewed the record to contain substantially different information simply does not create a legal issue important enough to justify the granting of certiorari; in fact, the issue is really much more factual than legal in nature.

Additionally, as this Court noted in *Arizona*, the "law of the case" doctrine is more discretionary than mandatory. The instant case well illustrates why discretion is best employed to allow Morgan to present the new affidavit. If the lower courts do not allow him to do so, the parties will be forced to try this case at which time Sheriff

Morgan would take the stand, testify consistently with his new affidavit, the Petitioners would be unable to rebut his testimony just as they are at summary judgment stage, and the district court would then be required to grant a motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Applying an exception to the "law of the case" doctrine here prevents that waste of time and resources.

Finally, both the district court and the Eleventh Circuit were clearly correct in their finding that Sheriff Morgan presented substantially new information upon his second summary judgment motion. On the first interlocutory appeal, the Eleventh Circuit surmised, by negative inference, that Morgan must have known the details about alleged constitutional violations occurring in the first "raid" before he authorized the second one. However, the record was silent on that point. The record showed only that he had been told that an undercover "buy" had been made and several individuals had been arrested. On the second motion for summary judgment, Sheriff Morgan fills the "void" in the record by testifying that information about a drug "buy" and an accompanying arrest represented *all* he knew about what occurred at the first "raid". Because the Eleventh Circuit was so keenly focused on this knowledge, Morgan's new affidavit presented substantially new information.[9]

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[9] Petitioners assert that this information could have been brought out upon the first motion for summary judgment. However, this assertion is based on hindsight. Respondents entered evidence into the record about what Morgan had been told; however, the need to enter evidence about what Morgan

CONCLUSION

Based upon the foregoing, Respondents Chambers County Commission and James C. Morgan respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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had *not* been told simply was not apparent until the issues had been fleshed out in the district court's order and the Eleventh Circuit's original order.